

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL CRAIG HEDGES,

Defendant and Appellant.

C044891

(Super. Ct. No.
00F4866)

Defendant Michael Craig Hedges's claim of ineffective assistance of counsel is predicated on his lawyer's failure to object to expert testimony that, in his view, was inadmissible but, in our view, assisted the jury in understanding the marketing and distribution strategies utilized by successful, and not so successful, methamphetamine entrepreneurs. His lawyer cannot be faulted for failing to object to the admissibility of plainly admissible evidence. Defendant's

conviction for the possession of methamphetamine for sale is affirmed.

FACTS

A Shasta County deputy sheriff stopped defendant at 12:45 a.m. on June 4, 2000, because his rear license plate light was inoperable. The parties stipulated that the detention and subsequent arrest were lawful. During the ensuing search of defendant, the deputy confiscated a marijuana pipe, and during a search of his car, he found a fanny pack on the driver's floorboard. Inside the pack he also found a glass pipe suitable for smoking methamphetamine. Defendant admitted the two pipes were his. The deputy stopped the search, arrested defendant, and took him to jail.

After delivering defendant for booking, the deputy retrieved the fanny pack from his patrol car. The contents of the pack included marijuana, four baggies of methamphetamine, and a smaller pink fanny pack containing various items useful in the ingestion of drugs, such as matches, rolling papers, straws, two pairs of scissors, filter screens, and lighters. Defendant's name appeared on a prescription, a cellular telephone service agreement, a medical laboratory report, and two applications for welfare that were also found in the fanny pack. The parties stipulated there were .13, .45, .33, and .25 grams of methamphetamine in the baggies.

A jury convicted defendant of possession of methamphetamine for sale (Health & Saf. Code, § 11378),¹ transportation of methamphetamine (§ 11379, subd. (a)), possession of a pipe for smoking a controlled substance (§ 11364), and possession of 28.5 grams or less of marijuana (§ 11357, subd. (b)). Defendant admitted he served two prior prison terms and the court found he had a strike for a 1996 conviction of first degree burglary. The court imposed a prison term of eight years. On appeal, defendant challenges only his conviction of possession of methamphetamine for sale.

DISCUSSION

Defendant contends he did not receive adequate representation because his lawyer failed to object to a police officer's expert testimony. He argues that the police officer improperly offered his opinion as to the definition of the crime, defendant's intent, and defendant's guilt. He misreads the record and misinterprets the law.

Defendant, with good reason, does not contest the police officer's qualifications as an expert on the illegal use and sale of narcotics. He has specialized in drug enforcement for 25 of his 26 years as a peace officer. He has taken over 327 hours of specialized training, taught other officers, served on the Shasta Interagency Narcotics Task Force, and worked as an undercover drug agent where he "purchased methamphetamine and

¹ All further statutory references are to the Health and Safety Code unless otherwise indicated.

other street drugs, worked with numerous informants over four years doing buy-bust operations, doing buys to write search warrants on, and going to training every year provided through the California Narcotics Officer's Association which dealt with use of drugs, possession for sales of drugs, transportation of drugs, the methods, concealing of drugs, writing of search warrants, managing, working with informants, basically all aspects of drug investigations." While using informants for over 22 years, the police officer interviewed both buyers and sellers of methamphetamine.

Based on his years of training and experience, he opined that .13, .25, .33, and .45 grams were each usable amounts of methamphetamine. He had become intimately familiar with the methods by which methamphetamine is packaged and sold. He explained that a typical user would buy one bag of methamphetamine at a time to get high for the day. Not only do typical users lack the financial resources to buy greater quantities at a time, but they also "don't want to get caught with a bunch of bags because it would be as if they were selling meth," and multiple bags would be much harder to hide or dispose of if they were pulled over by the police.

By contrast, according to the narcotics expert, "[p]ossession for sales is typically more than one bag of methamphetamine, and it's carried exactly for that purpose. People will carry two, three, four, five bags at a time. Usually you don't see more than five, and what they will do is they will take their amount of methamphetamine from their

purchase, package the rest in smaller quantities to sell so they can get all of their money back for their next purchase in an effort not to have to steal stuff or rob people to get their money. So they will be selling meth so they will have numerous bags in their possession to sell so they can go buy one big bag because you get a cheaper rate the more you buy at a time, and then they will divide that up into smaller bags, carry that so they can sell it."

Hence, the expert further explained to the jury that possession of multiple bags of methamphetamine, in his experience, suggested possession for sale assuming the baggies contained usable amounts of methamphetamine. Some users retain baggies with scant traces of methamphetamine in case of an emergency. If unable to obtain a usable amount, they will rip open the "scraper" bag and lick the inside of it "to [take] the edge off until they can get their bag." He distinguished, therefore, between the possession of four scraper bags, which would not suggest possession for sale, and possession of baggies containing two-tenths of a gram or above, which would.

During the search of defendant's fanny pack, three blue-colored baggies and a smaller clear baggie were confiscated. The expert, based on conversations with sellers, explained that they use colored bags "so that when they're in a darkened place at night or when they pull them out of their pocket it's easily distinguishable either to the amount or that is one that is for sale. The clear bag would be theirs or one that is promised to another certain person. In this case with three blue ones and

one clear one and the clear one seems to have a different, like heat-sealed, just adds to my belief that their [sic] possession for sales based upon that, the colors." Thus, because defendant was found in possession of multiple color-coded bags of usable quantities of methamphetamine, the narcotics expert opined that the methamphetamine was for sale.

He testified that the absence of pay-owe sheets and scales in the fanny pack or in the car was insignificant. Astute sellers have come to realize that these items are persuasive evidence of sales. Hence, they generally leave their measuring devices and accounting ledgers at home or, with increasing frequency, either hidden or at someone else's house.

Defendant insists the officer's testimony transgressed the proper confines of expert testimony. We disagree. Courts have uniformly upheld the admission of opinion testimony that drug contraband was being held for sale rather than for use. "In cases involving possession of marijuana or heroin, experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging and normal use of an individual; on the basis of such testimony convictions of possession for purpose of sale have been upheld." (*People v. Newman* (1971) 5 Cal.3d 48, 53; *People v. Harris* (2000) 83 Cal.App.4th 371, 374-375; *People v. Parra* (1999) 70 Cal.App.4th 222, 227; *People v. Carter* (1997) 55 Cal.App.4th 1376, 1378; *People v. Douglas* (1987) 193 Cal.App.3d 1691, 1694-1695 (*Douglas*).) "It is neither unusual nor impermissible for an expert to testify to an

ultimate issue, and such opinions are expressly contemplated by Evidence Code section 805." (*People v. Doss* (1992) 4 Cal.App.4th 1585, 1596.)

In *Douglas, supra*, 193 Cal.App.3d 1691, a police officer with extensive training and experience in the suppression of narcotic and dangerous drug traffic was asked, "'[D]o you have an opinion, officer, as to whether or not the marijuana . . . was possessed for personal use or was possessed for sale?'" (*Id.* at p. 1694.) Like here, the defendant did not challenge the officer's qualifications. In deciding whether the question was proper, the court extracted the basic rule articulated in *People v. Cole* (1956) 47 Cal.2d 99, 103 (*Cole*), as follows: "'[The] decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*Douglas, supra*, 193 Cal.App.3d at p. 1694.) The court concluded that the inferences to be drawn from the assumed conduct of a purported seller of marijuana and of a purported buyer, the weight and packaging of 14 bindles of marijuana possessed by the purported seller, and the forty-four \$1 bills found in his possession were "'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*Ibid.*, quoting *Cole, supra*, 47 Cal.2d at p. 103.) The court also refused to hold that expert opinion is

inadmissible merely because it coincides with an ultimate issue of fact. (*Douglas, supra*, 193 Cal.App.3d at p. 1694.)

Despite these fundamental principles, defendant maintains the narcotics expert defined the crime, opined on defendant's specific intent, and concluded he was guilty of possession for sales. He struggles to twist his facts to fit the templates of the cases he cites. But his cases simply do not fit his facts.

In *People v. Torres* (1995) 33 Cal.App.4th 37, 44 (*Torres*), a police officer testified, "'My definition of robbery is taking of someone's personal property through force or fear with the immediate danger of something happening to you.'" He also testified that when defendant, a gang member, "collected rent," that is, collected money from drug dealers to allow them to sell drugs in his gang's neighborhood or territory, he committed a robbery. (*Ibid.*)

As to the officer's definition of robbery, the Court of Appeal concluded that the definition of a statutory term is not a subject for opinion testimony, but rather, it is a matter of law on which the court should instruct the jury. (*Torres, supra*, 33 Cal.App.4th at p. 45.) Nor is it proper for a witness to express an opinion concerning the guilt or innocence of the defendant. (*Id.* at pp. 46-47.)

The narcotics expert in this case did not give a personal rendition of his version of the crime as the police officer provided the jury in *Torres*. Rather, based on his familiarity with the custom and practice of those who sold methamphetamine, he opined that a person in possession of four baggies of

methamphetamine, particularly when three of the four baggies were color-coded, would possess the baggies for sale. The jurors in a drug case may not possess the same familiarity with drug sales as those involved in either the trafficking or policing of narcotics. As a consequence, although a layperson might not appreciate the significance of several baggies containing usable quantities of methamphetamine, an expert views the evidence as indicia of sales. Here, the expert's opinion assisted the jury to interpret the evidence in the particularized milieu of drug trafficking. Thus, the officer's testimony did not run afoul of *Torres*.

Nor does *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*), a case involving gangs, not drugs, dictate a different outcome. In *Killebrew*, a gang expert opined that because gang members generally know when their comrades possess a gun, each gang member in the car actually knows of the gun and constructively possesses it. (*Id.* at p. 652.) This opinion on the subjective knowledge and intent of each occupant in the car was improperly admitted because it went beyond a general description of gang behavior. (*Id.* at p. 658.)

It is true the police officer opined that the possession of multiple, color-coded baggies of usable amounts of methamphetamine suggested the possession of the baggies was for sale. But section 805 of the Evidence Code expressly permits opinion testimony when it "embraces the ultimate issue to be decided by the trier of the fact." The expert's testimony in this case assisted the trier of fact to interpret the physical

evidence in light of the realities of buying and selling drugs on the street. By contrast, the police officer in *Killebrew* attempted to convince the jury that the defendant possessed a specific intent to possess a gun he may or may not have known was in the car. We conclude that *Killebrew's* reasoning has no application to the expert's opinion of the physical evidence of drug sales in this case.

Since the police officer's testimony was not objectionable, defense counsel was not ineffective for failing to object to it. (*People v. Ochoa* (1998) 19 Cal.4th 353, 463.)

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

BLEASE, Acting P.J.

BUTZ, J.